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FEB 18 1926

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No. 263

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

UNION INSULATING & CONSTRUCTION
COMPANY,

vs.

THE UNITED STATES,

Appellant,

Appellee.

} Appeal from the
Court of Claims.

BRIEF FOR APPELLANT.

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STATEMENT OF GROUNDS ON WHICH JURISDICTION
OF THIS COURT IS INVOKED.

Judgment was entered in the Court of Claims on April 28, 1924. (Rec. 47.) The claims advanced were for damages aggregating \$30,697.73, due to the breach of contract by the defendant. Each item of plaintiff's claim was denied. (Rec. 45-47.) The appellant seeks to reverse the Court of Claims' denial of a part of these claims aggregating \$3,419.65. An appeal was allowed January 12, 1925 (Rec. 48), and within ninety days from the order of the Court of Claims overruling plaintiff's motion for a new trial. Jurisdiction of this Court is invoked under Sections 242 and 243 of the Judicial Code. (These sections have since been repealed but were in effect at the time the appeal was allowed.)

Cases sustaining the jurisdiction of this Court are:

United States v. Elliott, 223 U. S. 524; 56 L. Ed. 535.

In re Sanborn, 148 U. S. 222; 37 L. Ed. 429.

Journal & Tribune Co. v. U. S., 254 U. S. 581; 65 L. Ed. 415.

STATEMENT OF THE CASE.

All that is material to the consideration of the questions presented is found in the following:

The plaintiff contracted with the defendant to do certain construction work at the United States Nitrate Plant No. 2 at Muscle Shoals. (Rec. 40.) The Government agreed to furnish at all times the necessary right-of-way for ingress and egress to the place of storage of certain materials, and also agreed to furnish certain rolling stock for the transporting of the materials to the site of the work. (Rec. 10, 11, 40.) The plaintiff's claim in this connection is for damages resulting from the failure of the defendant to keep the right-of-way in a condition for the transportation of materials, as the plaintiff believes the defendant was obligated to do under the contract. The Court of Claims denied the claim.

The contract provided that the work should begin not later than June 10th. (Rec. 10, 43, 47.) Inability to get issued certain material (which the defendant was obligated under the contract to furnish (Rec. 10, 15) caused a delay of three days to the plaintiff, during which time the plaintiff was carrying overhead. For the delay, the plaintiff claimed damages which were denied in the Court of Claims.

ERRORS RELIED UPON BY APPELLANT.

First. The Court of Claims erred in holding that the government of the United States was not bound to maintain the right-of-way which the defendant was to provide.

Second. The Court of Claims erred in denying the plaintiff's claim for delay resulting from failure of the defendant to issue material to the plaintiff when requested, on June 10, 1920.

ARGUMENT.

(Because of the shortness of the argument it is not preceded by a summary.)

I.

The defendant was bound to maintain the right-of-way which the defendant was to provide.

The contract provided (Rec. 10. 45) :

"The U. S. of America to furnish at its present location on the reservation at U. S. Nitrate Plant No. 2 all other construction materials, the contractor to perform all necessary labor required in transporting such materials to the proper place for use in construction, the U. S. of America at all times to furnish the necessary right of way for ingress and egress to the place of present storage of such materials and the place of ultimate use in construction.

"The United States Government further agrees to furnish to the Contractor for the purpose of transporting materials and performing the necessary construction work, such tools and equipment including locomotives, flat cars, dump cars, hoisting engines, locomotive cranes, steam shovels, concrete mixers, air compressors, automobile trucks, clam-shell buckets, etc., as are now the property of the United States Government and available at U. S. Nitrate Plant No. 2, and in such quantities as in the discretion of the Constructing Quartermaster, may be reasonably necessary for such use in construction and further may be reasonably furnished by the United States Government without material detriment or inconvenience to the United States Government."

The Court of Claims found that the right-of-way furnished by the United States consisted of railroad tracks running from the site of the work to the storage yards, and that the

racks were turned over to the plaintiff for its use, together with the necessary rolling stock. (Rec. 40.) The contract specially provided that the defendant should furnish such locomotives, flat cars, dump cars, etc., as were as the U. S. Nitrate Plant No. 2, and were reasonably necessary for use in the construction. (Rec. 10.) Under these circumstances, a right-of-way consisting of railroad tracks would not be furnished unless the contractor could use upon such tracks the locomotives, cars, etc., to transport materials. So, when the Government agreed to furnish a necessary right-of-way for ingress and egress consisting of railroad tracks, and to do so *at all times*, and, in addition, to furnish cars, locomotives, etc., it necessarily follows that such agreement included the obligation to keep said railroad tracks in a condition fit for use in the manner that railroad tracks would be used for the transportation of materials.

The right-of-way was to be more than a mere right of passage over railroad tracks; it was to be a usable track, else why the provision that such right-of-way was to be at all times a necessary right-of-way, and why the provision for furnishing locomotives, cars, etc.? For railroad tracks (and the Court of Claims found that "right-of-way" was railroad tracks) to be a necessary right-of-way at all times for cars and locomotives, such tracks must be kept usable, physical things. The tracks must be maintained. The phrase "right-of-way" is not necessarily confined to a right of passage. *New Mexico v. U. S. Trust Co.*, 172 U. S. 171; 43 L. Ed. 407.

Further, the rolling stock to be furnished the plaintiff by the defendant under the terms of the contract was to be maintained by the contractor. (Rec. 10.) There was no such provision in regard to the right-of-way.

The Government failed to keep the tracks in usable condition. Derailments occurred and in connection therewith the plaintiff expended labor. In order to complete the con-

struction the defendant had to repair the tracks. Damage to rolling stock and equipment because of derailments had to be repaired. The Court of Claims found (Rec. 40, 45) that these items cost the plaintiff, respectively, \$1,653.49, \$705.50 and \$700.66, aggregating \$3,059.65. There was a breach of contract on the part of the Government, and, consequently, the plaintiff should recover on its claim for failure on the part of the Government to maintain the right-of-way.

The plaintiff occasioned the breach of contract by failing to maintain the right-of-way.

II.

The plaintiff's claim for delay resulting from the failure of the defendant to issue material to the plaintiff should be allowed.

The contract provided that work should be commenced by June 10, 1920. (Rec. 10, 43, 47.) The Court of Claims found the plaintiff ready to begin work on June 10th. (Rec. 43.) The plaintiff was not able to begin work until June 13, 1920. (Rec. 43.) The delay resulted from inability to get material issued to the plaintiff (Rec. 43), the defendant being obligated, under the contract, to furnish certain materials. (Rec. 10.) The Court of Claims said the delay was not unreasonable. Whether or not such delay was reasonable or unreasonable is not pertinent; for the contract provided that work should begin not later than a day certain. (Rec. 10, 43, 47.) The defendant should have been ready to carry out its part of the contract on this day. The Court of Claims found (Rec. 43) that the amount expended by the plaintiff to persons kept waiting was \$360. This amount the plaintiff should recover.

CONCLUSION.

plaintiff and appellant should recover its damages
on by the failure of the defendant to maintain the
of-way and its damages for the delay caused by the
ant.

Respectfully submitted,

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